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IN THE

# Supreme Court of the United States

October Term, 1967.

No. 923.

ALFRED AVINS,

*Petitioner,*

vs.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

1. Should not this Court deny an application for discretionary review where both the District Court and the Court of Appeals concurred in the factual finding that the legal issue attempted by Petitioner to be set forth is not supported by the record?

2. Even though not necessary to its result, did not the Court of Appeals properly rule that the student editors of a Law Review have discretion to exercise an editorial judgment including the right to decide that a particular viewpoint set forth in an article is not suitable for publication?

## STATEMENT OF THE CASE.

### A. Procedural History.

In June, 1966, the Petitioner, Alfred Avins, appearing *pro se,* instituted suit in the United States District Court for the District of New Jersey against the Respondent Rutgers—The State University of New Jersey. The Complaint, as subsequently amended, charged violations of the Petitioner's Federal Constitutional and statutory rights, rested jurisdiction on Sections 1331, 1332 and 1343 of Title 28 of the United States Code, and requested a declaratory Judgment and an injunction (A17-19; 20)*. Respondent moved pursuant to Federal Rule of Civil Procedure 12(b) to dismiss the Complaint alleging, *inter alia,* failure to state a claim upon which relief could be granted. Petitioner then moved for Summary Judgment in his favor and Respondent cross-moved for Summary Judgment (A21; 45). Both parties filed affidavits in support of their respective motions (Petitioner: A21-45; Respondent: A45-50), together with Interrogatories propounded by the Petitioner and answers thereto by the Respondent (A19; 20; 51-53; 54).

On December 23, 1966 the various motions came on for hearing before the Honorable Robert Shaw, U. S. D. J. By stipulation of the parties, the Court treated the factual record as then constituted as being sufficiently complete to render final judgment—with one qualification by the Petitioner concerning the relevancy of certain Interrogatories, the Answers to which he considered to be inadequate (A2). Judge Shaw, finding the Interrogatories involved to be either irrelevant or improper (A5) delivered an oral opin-

* References are to the Joint Appendix filed in the United States Court of Appeals and filed in this Court pursuant to Rule 21(1).

ion concluding that the Respondent's motion for summary judgment should be granted, the Petitioner's motion for summary judgment should be denied and, as a finding of fact, that Petitioner's allegations were not proved. (Appendix B, Petition for Writ of *Certiorari*, 28-41.) Subject matter jurisdiction was found to exist under 28 U. S. C. §1343(3) (A8). On December 28, 1966, an Order was filed granting a judgment in favor of the Respondent and against the Petitioner with prejudice and without costs (A16).

On January 10, 1967, a Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed by the Petitioner. On November 2, 1967, that Court affirmed the Judgment of the District Court, with costs, in an Opinion by Circuit Judge Maris.

This Petition followed.

**B. The Facts.**

In April, 1966, the Petitioner, a citizen of the State of Tennessee, a law professor at Memphis State University, submitted an article to the Board of Editors of the *Rutgers Law Review* for "consideration for publication" (A28). The *Rutgers Law Review* is published by the Law School, which is a division of the Respondent, Rutgers—The State University. The educational facilities of the University, including the *Rutgers Law Review*, are financed by appropriation of public funds by the New Jersey Legislature (A8).

The article in question was entitled "DeFacto and DeJure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875". It was read, evaluated and considered by a student at the Law School, Mr. Lee Calligaro, in his capacity as Articles Editor of the *Review* (A46). After consulting with other members of the Board of Editors, the decision was made not to print

Avins' article. Calligaro then so informed Avins by letter dated May 6, 1966. He described the article as being "well-written" and said that it "raised several interesting points". But Mr. Calligaro went on to give the following reasons for rejection:

> "It is our feeling that approaching the problem from the point of view of legislative history alone is insufficient. Most of the material you have presented here was before the Court in *Brown*, and, as the Court pointed out, 'although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.' 347, U. S. 483, 489.
>
> I want to make it very clear that we are not rejecting this article merely because of the conclusion it reaches. We would be happy to consider an article taking a pro-segregation position, but feel that such an article would have to present a more comprehensive and original analysis of the legal rationale for limiting, or rejecting, the *Brown* rule" (A30).

By letter of May 12th, Avins replied to Mr. Calligaro (A49). The student editor then replied to Dr. Avins in letter of May 18, 1966, and again set forth the reason for rejection:

> "I certainly agree with you that 'ideological purity is not the function of a law review.' I want to emphasize that our decision concerning your piece was not based upon any 'liberal outlook.' Your article was given what I hope qualified as close and objective study, and was read and considered carefully by the Board of Editors."

In opposition to the Petitioner's motion for summary judgment and in support of its own motion, Respondent

submitted an affidavit by Mr. Lee Calligaro. Mr. Calligaro, in his affidavit, categorically denied that the article was rejected because of the ideological viewpoint expressed in it, but rather stated the rejection was because the article was, in the opinion of the editors, not sufficiently significant, in the light of current debate, to warrant publication. Mr. Calligaro, in his affidavit, further denied that the *Rutgers Law Review* has or had any policy, as alleged by the Petitioner, of only accepting articles reflecting a "liberal" jurisprudential outlook in constitutional law or, as alleged by the Petitioner, that his article was rejected solely because it reflected a "'conservative" ideological or jurisprudential outlook.

On several occasions, the Petitioner stated that he did not dispute Calligaro's good faith nor did he believe Calligaro to be insincere. (See, e.g., Avins Brief in the Court of Appeals 24.) The District Court, without objection, so approached the case (Appendix B, Petition for Writ of *Certiorari*, 31*, 37.) Rather, Petitioner contended and still contends that Calligaro and all of the other student editors had been brainwashed, i.e.,

> "subtly but thoroughly indoctrinated into liberal jurisprudence to such an extent that they are incapable of doing their own thinking or evaluation and of knowing to what extent their views represent ideological considerations." (Avins Brief in the Court of Appeals 16.)

In attempting to prove this contention, Petitioner propounded several Interrogatories addressed to the Respond-

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* "I might note here at this point that the defendant (should read "Plaintiff") has conceded that he does not challenge the good faith of the statement by the editor rejecting his article and concedes for present purposes that the statement is credible, and qualifies the concession by suggesting that notions were injected into the mind of the editor which made it impossible for him to be capable of objective thinking." (Opinion of Judge Shaw, Appendix B, Petition for Writ of Certiorari 31.)

ent concerning Lee Calligaro's educational background and his opinions on certain matters of constitutional law (A51-53). Respondent, taking the position that if such matters were to be inquired into at all on discovery, it should be by way of deposition, answered only those questions calling for information in its possession. The Court below, took the position that the material relating to Mr. Calligaro's examination of historical materials relating to the legislative history of the Fourteenth Amendment (Interrogatory #1) was not relevant (A5). This was clearly correct in view of Avins' concession that he did not attack Calligaro's good faith and/or credibility. As to the other Interrogatories, ##3 through 8, requesting information as to Calligaro's beliefs on certain matters of constitutional law (A51-53), the District Court found them to be improper for this form of discovery (A5).

In support of his motion, Petitioner submitted his own affidavit to the District Court, that affidavit attempted to set forth evidence in support of Petitioner's contention that the *Rutgers Law Review* had a policy of accepting only "liberal" articles on Constitutional issues. (See Paragraph 9 of the Complaint, incorporated by reference into the affidavit (A18) and paragraph 4 of the affidavit (A23)). Even assuming the competence of such evidence it is not relevant because of Petitioner's concession of Calligaro's good faith. If such a policy existed it would not advance Petitioner's case because he admits that Calligaro did not reject the article pursuant to such a policy when he admits the truth of Calligaro's statement of his reasons for rejection.

Additionally, the article itself was submitted to the District Court as an Exhibit annexed to Calligaro's affidavit. The Court read and considered the article, remarked upon certain passages in it (A9-11), found it to be "very lengthy" and, without expressing any opinion as to the merits of the subject matter, found that there could be reasonable differ-

ences of opinion as to the educational value of publishing the article (A15).

On this record, the District Court made the finding of fact that:

> ". . . The reasons for rejection as stated by Mr. Calligaro were valid and that this particular article was one which it would not be unreasonable for any editorial review board of a Law Review to reject." (Appendix B, Petition for Writ of *Certiorari*, 40.)

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## ARGUMENT.

### POINT I.

### THIS COURT SHOULD DENY AN APPLICATION FOR DISCRETIONARY REVIEW WHERE BOTH THE DISTRICT COURT AND THE COURT OF APPEALS CONCURRED IN THE FACTUAL FINDING THAT THE LEGAL ISSUE ATTEMPTED BY PETITIONER TO BE SET FORTH IS NOT SUPPORTED BY THE RECORD.

Even if the Court of Appeals was in error in finding that no violation of Avins' right to free speech occurred even if the rejection of the article was on ideological grounds, that Court's judgment must still be affirmed. This is because of the factual finding of the District Court—sitting as the final trier of the facts—that there was insufficient proof of Petitioner's claim of rejection on ideological grounds (A16). The Court of Appeals recognized this finding and did not interfere with it. (Appendix A, Petition for Writ of *Certiorari* 25.)

A Law Review can validly reject an article for many

reasons. One of these reasons would be simply that, being a scholarly journal, the Law Review would not have to set forth views which are not scholarly. Another proper reason for rejection would be that, while setting forth a well-researched, defendable legal viewpoint, the views set forth do not add to scholarly knowledge in expressing that viewpoint, i.e., the views expressed are, for one reason or another, insignificant. Such, of course, was the reason for rejection here. The affidavit of the student editor submitted to the District Court by Respondent states categorically that the reason for the rejection of the article was that it set forth a viewpoint which has been expressed and published a sufficient number of times and that the scholarly community has moved beyond the problems discussed by Avins. The letters of rejection, as quoted previously, set forth the same point of view. The writer of the letters took great pain to explain to Avins that the article was not being rejected because it was a conservative article, or because it was a pro-segregation article, or for any reason concerning the ideological viewpoint of either the article or its author, but rather because the analysis contained in the article was not sufficient "comprehensive" or "original". The only rational interpretation of this letter and the one adopted by the District Court is that the editors of the *Rutgers Law Review* did not feel Avins' article to be significant in the sense that his analysis did not add to the available body of knowledge.

Petitioner's argument that the student editors of the *Law Review* have been so "indoctrinated" in a liberal ideology as to be "incapable of doing their own thinking" is clearly without merit. Petitioner has no standing to contest the competency of the editor—the most he may question is whether the man acted in good faith and truthfully expressed his reasons for rejection. There being no contrary contention by Petitioner, the District Court was clearly cor-

rect in accepting Calligaro's affidavit and letters as true—and proper—reasons for rejection. In affirming, and describing Petitioner's allegation as "frivolous" the Court of Appeals was obviously adopting the view that Petitioner could not contest the competence of the student editor. (Appendix A, Petition for Writ of *Certiorari* 27.) No substantial issue, warranting a grant of *certiorari* is presented by the treatment of the allegation by the lower Courts.

This being the state of the record, i.e., where both of the lower courts have agreed that the Petitioner's claims have not been substantiated factually, the granting of the discretionary *writ of certiorari* would not be provident. The legal question, which Petitioner attempts to set forth, is, at best, obscurely presented by this record.

## POINT II.

## THE COURT OF APPEALS PROPERLY HELD THAT THE STUDENT EDITORS OF A LAW REVIEW IN CONSIDERING WHETHER TO PUBLISH AN ARTICLE HAVE DISCRETION TO EXERCISE AN EDITORIAL JUDGMENT WHICH INCLUDES THE RIGHT TO DECIDE THAT A PARTICULAR VIEWPOINT IS NOT SUITABLE FOR PUBLICATION.

As stated earlier, because both of the Courts below concurred in the judgment that Petitioner had not factually made out his case, it is not necessary to reach the legal issue which Petitioner attempts to raise. The Court of Appeals did, however, deal with the issue which it stated as being whether

> ". . . a law review published by a state-supported university, such as the defendant [respondent], is a public instrumentality in the columns of which all must be

allowed to present their ideas, the editors being without discretion to reject an article because in their judgment its nature or ideological approach is not suitable for publication." (Appendix A, Petition for Writ of *Certiorari* 23.)

The disposition of this issue in favor of the Respondent, over Petitioner's contention that so doing violates his right to freedom of speech under the First Amendment, is said to be contrary to the decisions of this Court and other lower courts and one of great public importance. It is submitted that the decision was completely in accord with accepted principles of constitutional law.

In considering whether the Petitioner's right to freedom of speech has been infringed, it is important to examine the exact nature of the factual allegations which have been made in this case. It is alleged only that the Respondent's agents, i.e., the staff of the *Rutgers Law Review* "rejected and refused to publish" the Petitioner's article (Allegation 9 of the Complaint, A18). It is nowhere alleged that the Respondent or any person acting on behalf of either the Respondent or the State of New Jersey prevented Petitioner from saying anything he wanted. The question purely and simply then is *whether the refusal of the Defendant to say for the Petitioner that which he wishes to have heard denied the Petitioner the right to freedom of speech.* To ask the question is to answer it. As the Supreme Court stated recently in rejecting a contention made on free speech grounds:

> "Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so however and whenever they please. That concept of constitutional law was vigorously and forthrightly rejected in . . . *Cox v. Louisiana*. . . . We reject it again. The United States Constitution does not forbid a state

to control the use of its own property for its own lawful nondiscriminatory purpose." *Adderley v. State of Florida*, U. S. at , 87 S. Ct. 242, at 247 (1966).

The "lawful nondiscriminatory policy" referred to in *Adderley* is, in this situation, the freedom of expression of and the educational purpose of the *Rutgers Law Review*. As part of the University of the State of New Jersey, the *Rutgers Law Review* is within the First Amendment "freedom of the entire university community." *Griswold v. State of Connecticut*, 381 U. S. 479, 482, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). But even without consideration of an academic privilege, it is clear that as a portion of the press, to force the *Rutgers Law Review* to *publish* a particular piece of work is a violation of its rights under the First Amendment. In *Garland v. Torre*, 259 F. 2d 545 (2d Cir.), *cert. denied* 358 U. S. 910, 79 S. Ct. 237, 3 L. Ed. 2d 231 (1958), the United States Court of Appeals summarized the meaning of the freedom of the press in this way:

> "Freedom of the press within the historic meaning of the First Amendment meant primarily freedom from previous restraints upon publication and freedom from censorship. *Near v. State of Minnesota*, 1931, 283 U. S. 697, 716, 51 S. Ct. 625, 75 L. Ed. 1357. Yet in the domain of indispensable First Amendment liberties, it is essential 'not to limit the protection of the rights to any particular way of abridging it.' *Grosjean v. American Press Co.*, 1936, 297 U. S. 233, 249, 56 S. Ct. 444, 449, 80 L. Ed. 660. The fact that no direct restraint is imposed does not determine the question. *American Communications Ass'n C. I. O. v. Douds*, 1950, 339 U. S. 382, 402, 70 S. Ct. 674, 94 L. Ed. 925 '(A)bridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.' *National Ass'n for Advancement of Colored People v. State of Alabama ex*

*rel. Patterson,* 1958, 357 U. S. 449, 461, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488." (259 F. 2d at 548.)

The fear, expressed in *Garland,* supra, of abridgement of the freedom of the press through indirect and unintended forms of governmental action could well result from granting the relief sought by the Petitioner. To grant the relief demanded would place the Courts in the position of being a censor charged with the duty of determining the reasons for rejection and reviewing decisions with regard to the ideological viewpoint and the scholarly merit of material submitted to the *Law Review* for possible publication. Certainly even the fear of being subject to such review will have an inhibiting effect upon the editors of the *Law Review* forbidden by the First Amendment.

Petitioner relies upon several cases for the proposition that "if the facility is made available to persons of one political point of view, it must be made available on similar terms to those of differing points of view." (Petition for Writ of *Certiorari* 10-11.) In none of those cases did the government have a sufficient countervailing interest to justify the alleged interference with expression. Here, however, the State University is, as an educational tool, engaged in an activity which itself has expressional rights. The very purpose of a student edited scholarly journal is to give the opportunity to learn through exercising editorial discretion. *Not to recognize a right to establish editorial policy would destroy the function of the Review in legal education.* Thus, the countervailing expresisonal and educational rights of the defendant prevent a finding of a violation of Plaintiff's right to freedom of speech.

This was the view of the law taken by the Court of Appeals. Judge Maris held, in this regard, as follows:

> "Thus, one who claims that his constitutional right to freedom of speech has been abridged must show that he has a right to use the particular medium through which

he seeks to speak. This the plaintiff has wholly failed to do. He says that he has published articles in other law reviews and will sooner or later be able to publish in a law review the article here involved. This is doubtless true. Also, no one doubts that he may freely at his own expense print his article and distribute it to all who wish to read it. However, he does not have the right, constitutional or otherwise, to commandeer the press and columns of the Rutgers Law Review for the publication of his article, at the expense of the subscribers to the Review and the New Jersey taxpayers, to the exclusion of other articles deemed by the editors to be more suitable for publication. On the contrary, the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment and this is in no wise lessened by the fact that the law review is supported, at least in part, by the State." (Appendix A, Petition for Writ of *Certiorari* 24-27.)

## CONCLUSION.

For the foregoing reasons, the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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